IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KEVIN CLARKE, TREVOR BOECKMANN, HARRY CRANE, CORWIN SMIDT, PREDICT IT, INC., ARISTOTLE INTERNATIONAL, INC., MICHAEL BEELER, MARK BORGHI, RICHARD HANANIA, JAMES MILLER, JOSIAH NEELEY, GRANT SCHNEIDER, and WES SHEPHERD, *Plaintiffs*, v. COMMODITY FUTURES TRADING COMMISSION, *Defendant*.	Civil Docket No. 1:24-cv-00614-DAE The Honorable David Alan Ezra

PLAINTIFFS' OPPOSITON TO CFTC'S MOTION FOR A PROTECTIVE ORDER

Defendant Commodity Futures Trading Commission ("CFTC") is refusing to produce materials that would be traditionally part of the record underlying an agency decision, and now seeks protection from doing so. The CFTC's motion should be denied, and Plaintiffs' motion to compel should be granted.

A. The Administrative Record Is Incomplete

The CFTC concedes its obligation to produce the records underlying the agency's decision,[1] but what the agency has produced is clearly incomplete. As confirmed by the list of included documents,[2] the agency produced only communications between its officials, on the one hand, and the PredictIt Market and its officials and attorneys, on the other. *PredictIt did not need*

[1] CFTC's Motion for a Protective Order from Abusive Discovery Requests ("MPO"), Dkt. 101, at 4.

[2] CFTC Notice of Production of Administrative Record to Plaintiffs' Counsel, Dkt. 98-1.

the CFTC to produce those, PredictIt already had them. The CFTC produced no documents internal to the agency and no documents that were communications with an entity other than PredictIt. To the extent that the CFTC withheld internal agency documents under some kind of deliberative process or other privilege, the CFTC did not produce a privilege log or any other listing of documents that were withheld from the production, as has been long required by the courts of this circuit in APA cases.

At a minimum, in an APA case, a court must determine whether an agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" by "review[ing] the whole record or those parts of it cited by a party." 5 U.S.C. § 706(2). The "whole record" is everything "that was before the [decisionmaker] at the time he made his decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971). It is not what the agency chooses to reveal; it is not what the agency claims to have relied on. *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 32 (N.D. Tex. 1981) ("[T]the 'whole record' is not necessarily those documents that the agency has compiled and submitted as 'the' administrative record."). It is the information pertinent to the decision that was before the agency when the decision was made. Importantly, the CFTC has not denied the existence of documents and communications responsive to any of Plaintiffs' document requests, which include both internal and external communications and which are pertinent on their face to the agency's decisions with respect to political event markets. To the extent responsive documents exist, they were "before the [CFTC] at the time [it] made [its] decision," and thus should be included in the record. *Id.* "[I]t is axiomatic that documents created by an agency itself or otherwise located in its files were before it." *County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 76 (D.D.C. 2008).

Plaintiffs' document requests seek documents that should have been included in the

administrative record in the first place, so the CFTC should be compelled to produce the documents rather than being granted protection from doing so. Courts order production of additional documents "when a[n administrative] record is incomplete." *La Union del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 141 F. Supp. 3d 681, 694 (S.D. Tex. 2015). *See also Exxon Corp.*, 91 F.R.D. at 33 ("[L]imited discovery to complete the record is also proper where the Court determines the agency has failed to file the 'whole record.'"). No showing of bad faith is necessary when the record is incomplete. *Exxon Mobil Corp. v. Mnuchin*, No. 3:17-CV-1930-B, 2018 WL 10396585, at *3 (N.D. Tex. June 26, 2018) ("'[W]here a plaintiff contends that an agency has not submitted to the court all the materials that properly constitute the administrative record, no showing of bad faith or improper purpose is necessary'" to require completion of the record) (quoting *Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec.*, No. ELH-16-1015, 2017 WL 3189446, at *13 (D. Md. July 27, 2017)).

Indeed, each of the cases cited by the CFTC demonstrates that, when what has been produced are not the full set of materials that were before the agency when making relevant decisions, additional discovery is warranted. The issue in *Dep't of Commerce v. New York*, 588 U.S. 752 (2019), was whether *extra-record* discovery into the mental processes of administrative decisionmakers was warranted. The Supreme Court did not disturb the lower court's determination that the administrative record had to be *completed*. *Id.* at 782 ("At that time, the most that was warranted was the order to complete the administrative record.").[3]

Likewise, the Fifth Circuit's decision in *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687 (5th Cir. 2010), involved an attempt to supplement the administrative record

[3] Moreover, the Supreme Court *affirmed* the order of extra-record discovery. *Dep't of Commerce*, 588 U.S. at 781 ("Although th[e] order [for extra-record discovery] was premature, we think it was ultimately justified in light of the expanded administrative record.").

with material outside the agency's possession that the plaintiffs contended the agency *should have considered* before rendering their decisions—not material that was before the agencies. *Id.* at 705-06. The same is true of *OnPath Fed. Credit Union v. United States Dep't of Treasury, Cmty. Dev. Fin. Inst. Fund*, No. CV 20-1367, 2021 WL 5769468, at *1 (E.D. La. Dec. 6, 2021), where the plaintiff sought to supplement the administrative record with background material that was not before the agency at the time of its decision. Here, by contrast, Plaintiffs seek to *complete* what the agency has chosen to produce with material that *was before the CFTC* when it rendered its decision.

This Court should reject the false dichotomy urged by the agency, which now seeks incorrectly to "conflate supplementation of the administrative record and extra-record evidence. Supplementation completes the record by adding something that 'should have properly been included in the administrative record [but] was not . . . .'" *La Union del Pueblo Entero*, 141 F. Supp. 3d at 694 (quoting *The Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 113–14 (D.D.C. 2009)) (alterations in original).

The CFTC asserts that if the Court finds it necessary to review any evidence to issue a judgment in this case, the documents it has produced as the alleged record "are sufficient."[4] But the question is not whether those documents are sufficient; the question is whether those documents comprise the "whole record," as required by the APA and the Supreme Court interpreting the APA. *See Exxon Corp.*, 91 F.R.D. at 33 ("[A] record may be 'adequate' because it fully articulates the agency's reasoning, yet at the same time be 'inadequate' because it fails to provide the court all documents, memoranda and other evidence" that were before the agency when it rendered its decision).

[4] MPO at 5.

B. Plaintiffs' Document Requests Are Not Moot

1. The Court Should Not Stay Discovery, but Instead Should Compel the CFTC to Produce Documents Responsive to Plaintiffs' Requests

The Court should not stay the production of documents in this case. The CFTC did not disclose the documents before the agency when it made its challenged decision, and the parties and the Court should have those documents before deciding any dispositive motion.

Where a motion for judgment on the pleadings requires the court to evaluate the agency's decision-making process or the factual basis for the agency's action, the parties and the court must have available to them the documents before the agency when it made the decision before the motion is briefed and decided. *E.g.*, *No Casino in Plymouth v. Jewell*, No. 2:12-CV-01748, 2014 WL 3939585, at *5 (E.D. Cal. Aug. 11, 2014) (denying motion for judgment on the pleadings because court could not "make the necessary determinations . . . without reviewing the full context of the agency's decision in light of the administrative record as is required by the APA"). *See also Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579 (D.C. Cir. 2001) (vacating order denying preliminary injunction because administrative record had not been filed and was necessary to determine basis for agency's challenged action).[5] The motion for a protective order has everything

[5] The cases cited by the CFTC in its reply in support of the motion for judgment on the pleadings are inapposite. Dkt. 97 at 8-9. Two of the cases solely involved a discrete question of statutory interpretation. Both *People for the Ethical Treatment of Animals, Inc. v. USDA*, 194 F. Supp. 3d 404 (E.D.N.C. 2016), and *Animal Legal Defense Fund v. USDA*, 789 F.3d 1206 (11th Cir. 2015), applied the (now-defunct) *Chevron* deference to an agency's interpretation of statutes regarding licensure of animal exhibitors. In both cases, the legal requirement alleged by the plaintiffs simply did not exist. Thus, the Eleventh Circuit noted that "[d]irecting the district court to scrutinize the administrative record to evaluate whether USDA complied with a fictitious legal requirement would be the height of pointlessness." *Animal Legal Def. Fund*, 789 F.3d at 1224 n.13. Likewise, the motion for summary judgment at issue in *State v. United States Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017), was "limited to legal issues" that "[t]he administrative record would not be helpful to decide." *Id.* at 1115-16.

The present case stands in stark contrast. The Second Amended Complaint contends, for example, that each of the violations of the No-Action Relief asserted by the CFTC "is contrary to the substantial evidence in the record before the agency as a matter of fact . . . ." Dkt. 55 at 8 ¶ 18.

out of sequence. Production of the documents before the agency is a prerequisite to considering any motion for judgment on the pleadings in an APA case; a motion for judgment on the pleadings is not a barrier to reviewing those documents.

2. The CFTC Should Not Be Permitted to "Game the System"[6] via its Motion for Judgment on the Pleadings

The CFTC's lead argument presupposes that the CFTC will prevail on its Motion for Judgement on the Pleadings despite its backwards view of the consequences of such a ruling. In seeking judgment on the pleadings, the CFTC purports to "assume[] the accuracy of factual allegations in the [Second Amended Complaint]."[7][8] But the CFTC perplexingly contends that it will not be bound by these admissions going forward *even if its Motion for Judgment on the Pleadings is granted*, virtually guaranteeing an intolerable spin cycle of litigation where the agency staves off requested remedies at the last moment and then repeats its illegal actions.

The CFTC makes clear its view that its "implied admissions are effective only for purposes of the motion and do not in any way bind" the CFTC "in other contexts." Dkt. 97 at 8 (citing 5C Fed. Prac. & Proc. § 1370). Of course that is not the law. Admissions made for purposes of a motion for judgment on the pleadings are nonbinding only "'*if the motion addressed to the pleadings is denied*.'" *Id.* (emphasis added). The CFTC cannot have it both ways: have the motion *granted* based on admitting the allegations in the Second Amended Complaint, yet later *deny* the very allegations that led to the grant of the motion. For this reason, the CFTC's Motion

---

Unlike interpreting a statute or resolving some other threshold legal question, therefore, resolving that issue on a motion for judgment on the pleadings requires the full context of a complete set of documents before the agency when the decision was made.

[6] *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627, 641 (5th Cir. 2023).

[7] Dkt. 82 at 1 n.1.

[8] Dkt. 55 at 28 ¶ 93.

for Judgment on the Pleadings collapses under its own weight, and the CFTC should be required to defend its actions (or not) based on the *complete* administrative record.

C. The CFTC Will Not Be Overly Burdened in Responding to Plaintiffs' Document Requests

The Court should not grant any protective order on grounds that the document requests are burdensome. First, "Rule 26(c)'s requirement of a showing of good cause to support the issuance of a protective order indicates that the burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *In re Terra Int'l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998). "A party resisting discovery must show how the requested discovery is overly broad, unduly burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden. Failing to do so, as a general matter, makes such an unsupported objection nothing more than unsustainable boilerplate." *Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 580 (N.D. Tex. 2018) (quotation and citations omitted). The CFTC has offered nothing beyond stereotyped and conclusory statements, unsupported by affidavits or other evidence.[9]

And in reality, the CFTC could not adduce such affidavits or evidence. There would be little burden in searching the term "PredictIt" across the CFTC's systems, including email. The market isn't named "Smith" or "Jones," so there will not be many, if any, irrelevant results from such a search.[10] Likewise, the entities associated with the PredictIt Market include "Victoria

[9] *See* MPO at 7 ("The burden of attempting to collect these categories of documents and navigate complex privilege issues is extreme.");.Dkt. 102-1 at 11 ¶ 6 ("Plaintiffs' Requests are unreasonable and unduly burdensome in the circumstances of this action because all claims and issues raised by Plaintiffs' Second Amended Complaint can be resolved by granting the CFTC's pending Motion for Judgment on the Pleadings or, if that Motion is denied, by proceedings for summary judgment without the need for discovery."); Dkt. 102-1 at 26 ¶ 5 (same).

[10] The CFTC contends that Plaintiffs seek the "CFTC's communications with third parties that are not involved in this litigation," MPO at 7, but omits that the requested communications

University," "Aristotle," and "PredictIt, Inc."—also terms that likely will not yield many, if any, irrelevant results.

Second, Plaintiffs are not "fish[ing] for information to construct new or additional claims."[11] As explained in *Department of Commerce*, an agency's decision supported by a pretextual explanation cannot stand under the APA. 588 U.S. at 780-84 (affirming setting aside agency's action that was based on a pretextual rationale). Plaintiffs are entitled to know, based on the *complete* administrative record, whether the CFTC's stated bases for revoking the no-action letter are pretextual. If this Court grants the CFTC's Motion for Judgment on the Pleadings without first requiring the CFTC to complete the administrative record to bring this additional information to light, the CFTC would be free to restart the revocation process, as it obviously intends to do, based on that same pretext. That will lead to more litigation in the future—not the judicial efficiency the CFTC claims will result from granting its motion. And the CFTC could just keep that vicious cycle going forever—whenever it is in danger of its actions being held arbitrary and capricious, it can just ask the Court to vacate its action and start all over, leaving PredictIt in an endless loop of expensive and time-consuming legal process.

Third, the CFTC argues that Plaintiffs' document requests include "documents plainly protected by the attorney-client privilege or deliberative process privilege." MPO at 7. The CFTC thus *admits* that there are documents that it omitted from its production without providing any log. That is improper. If the CFTC asserts that certain documents would be covered by a privilege, it must provide a log so detailing the assertion and the documents withheld. "To be complete, an [administrative record] must include or otherwise account for '*all* documents . . . considered by

---

are only those "concerning, referring, or relating to PredictIt or the PredictIt Market." *See* Dkt. 102-1 at 22-23 ¶¶ 17-18.

[11] MPO at 6.

[the] agency,' not just the non-privileged ones." *Exxon Mobil Corp.*, 2018 WL 4103724, at *2 (quoting *Exxon Corp.*, 91 F.R.D. at 33). "If a privilege applies, the proper strategy isn't pretending the protected material wasn't considered, but withholding or redacting the protected material and then logging the privilege." *Id.* (citing *Inst. for Fisheries Res. v. Burwell*, No. 16-CV-01574-VC, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017)). This requirement is important because the deliberative process privilege does not protect purely factual or objective material, *BBC Baymeadows, LLC v. City of Ridgeland, Miss.*, No. 3:14-CV-676, 2015 WL 5943250, at *5 (S.D. Miss. Oct. 13, 2015), and if factual material can be separated from privileged material without compromising the privileged portions, that material is subject to discovery. *Branch v. Phillips Petroleum Co.,* 638 F.2d 873, 882 (5th Cir. 1981). Moreover, where, as here, there is a question about whether improper political pressure influenced the agency decision, documents related to that influence are not covered by the deliberative process privilege, and thus must be produced. *Louisiana v. Becerra*, No. 3:21-CV-04370, 2022 WL 1716243, at *5 (W.D. La. May 16, 2022).

CONCLUSION

For the reasons set forth above, the Court should deny the CFTC's Motion for a Protective Order and instead compel the CFTC to complete the administrative record underlying this action, without delay, to include the categories of documents requested by Plaintiffs.

Dated: December 13, 2024

Respectfully submitted,

/s/ Michael J. Edney
Michael J. Edney
Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
T: (202) 778-2204
medney@huntonak.com

Attorney for Plaintiffs Kevin Clarke, Trevor Boeckmann, Harry Crane, Corwin Smidt, Aristotle International, Inc., Predict It, Inc., Michael Beeler, Mark Borghi, Richard Hanania, James D. Miller, Josiah Neeley, Grant Schneider, and Wes Shepherd

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2024, a copy of the foregoing was filed electronically and was served on counsel of record through the Court's electronic case filing/case management (ECF/CM) system.

/s/ Michael J. Edney
Michael J. Edney